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No. 80-1945

In the Supreme Court of the United States

October Term, 1980

ARMED FORCES COOPERATIVE INSURING ASSOCIATION,
Appellant,

VS.

DEPARTMENT OF INSURANCE, STATE OF WYOMING,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

APPELLANT'S REPLY BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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I

APPELLEE'S MOTION FAILS TO DEMONSTRATE THAT THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL

Appellee in its Motion to Dismiss or Affirm has presented the issues in a different order from that in Appellant's Jurisdictional Statement and for convenience of the Court appropriate cross-references are herein made to such motion.

First (Federal Enclave Questions):

Appellee Wholly Fails to Controvert AFCIA's Contention That Its Operation on a Federal Enclave Provides It Immunity From State Taxation and Regulation.

This, Appellant's first point (pages 10 to 15 of Jurisdictional Statement, is not controverted or addressed by Appellee except to say incorrectly that AFCIA contends *itself to be a federal enclave!* (Page 6 of Appellee's Motion.) The Court below likewise sidestepped this point by adverting to other points, as mentioned on pages 12, 13, Jurisdictional Statement. Neither Appellee nor the Court below has confronted and addressed Appellant's first point and issue that its operation on a federal enclave provides it immunity from state taxation and regulation (wholly irrespective of its federal instrumentality status).

For a state to authorize and direct its officials to go onto a federal enclave and there undertake the massive and intensive investigation and supervision of an officially recognized non-profit military association as contemplated by Appellee under purported statutory authority (W.S. 26-2-116, 118, 119, 122) and as outlined in the NAIC Examiner's Handbook (pages A129 to A134, Jurisdictional

Statement), to tax Appellant and to require that it employ Wyoming licensed agents (W.S. 26-3-130) violate basic federal constitutional rights and provisions heretofore cited under "Questions Presented" 1 through 5, on pages I and II, of Appellant's Jurisdictional Statement. This point has not been answered because what the state seeks to do is without precedent or support. Appellee overlooks its obligation to accord the Kansas Cession Act full faith and credit. Questions Presented Nos. 1 through 5 under this point are substantial federal questions requiring plenary consideration. (Attention is here called to full citation now available, 5 Kan. App. 787, 625 P.2d 11 (1981) of *In the Matter of Armed Forces Cooperative Insuring Association from a Decision of the Board of Tax Appeals, State of Kansas* cited on page 11, Jurisdictional Statement.)

Second (Federal Instrumentality Question):

Appellant's Federal Instrumentality Status Is Not Dependent on Its Creation by Federal Statute or Regulation. (Replying to Point C, pp. 5, 6 of Appellee's Motion)

Appellee under "C" contends on pages 5, 6 that "a federal instrumentality must be created by federal statutes or federal regulations", citing four cases which involve federal statutes or regulations but do not hold that such are required: (1) In *McCulloch v. Maryland*, 17 U.S. (4 Wheat. 316) 429, 4 L.Ed. 579 (1819), the Bank of the United States was incorporated by Act of Congress of 10th April 1816, c. 44. AFCIA, of course, is not incorporated and *McCulloch v. Maryland* did not consider applicability of the new federal instrument doctrine to unincorporated associations but its broad delineation of federal "Means" and "Instruments" certainly includes AFCIA. (2) *Johnson v. State of Maryland*, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed.

126 (1920) held that a postal employee was immune from state prosecution for driving without a state driver's license, yet pointed to no specific federal statute or postal regulation making him a federal instrument but to the contrary held: "It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed" (41 S.Ct. at 17). Thus, Johnson was presumed to have been appointed a postman by general authority of the post office just as in the instant case the Department of Defense must be presumed to have acted within its general authority in appointing and designating AFCIA an officially recognized non-profit military association and the Army must be presumed duly authorized in providing real estate for its offices and operations and supervisory senior officers to manage and regulate AFCIA at Fort Leavenworth. No Act of Congress or federal regulation specifically designating Johnson a federal instrument was required to give him such status, and neither is such required for AFCIA. It is the substance that creates this relationship with the United States not the precise mode followed. (3) *Department of Employment v. United States*, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed. 2d 414 (1966), held the American Red Cross to be a federal instrumentality immune from state taxation and "that this immunity has not been waived by congressional enactment" (87 S.Ct. at 467). Chartered by an Act of Congress, the American Red Cross is supervised by federal officers as is AFCIA, but nowhere is it held that such incorporation is a requirement. (4) Finally, *Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942) held unincorporated post exchanges to be federal instrumentalities and that their establishment and control "in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force

of law." 62 S.Ct. 1169-1170. Likewise the operations of AFCIA on Army property under supervision by senior military officers stationed there are authorized in writing by the Commandant whose word has the force of law and whose authority is unchallenged by Appellee. Specific statutory or regulatory directions are not required because presumably the Commandant operated within the authority granted him by military regulations of general scope. Such authority is unchallenged herein. If individuals can become federal instruments under general appointive authority so may AFCIA in the manner herein followed. Article VI, Clause 2 of the Constitution does not require more to establish federal supremacy.

Appellant has never contended AFCIA *is* a federal enclave but under a separate independent point has contended it is located and operated *on* a federal enclave. (See pp. 10 to 15 of its Jurisdictional Statement.) Appellee improperly interjects such an incorrect statement of Appellant's contention in controverting its federal instrumentality point, thereby setting up a straw point to knock down. Obviously a federal enclave is a territorial *place* whereas AFCIA is a military related *activity* authorized by the federal government to take place there.

Third (Mail Order Point):

Appellee Overlooks This Court's Prior Mail Order Decisions Granting State Tax and Regulation Immunity to Non-Residents Having No In-State Property, Office or Agents. (Replying to Point B, pp. 4, 5 of Appellee's Motion)

Passing onto the third point urged by Appellant's Jurisdictional Statement, pp. 18-21, that even if *in personam* jurisdiction were present, the state court nevertheless was powerless to regulate and tax a non-resident mail

order seller having no office, property or agents within the state, Appellee (pp. 4, 5 of motion under point B) and the court below simply ignore the repeated holdings of this Court cited on page 20 of the Jurisdictional Statement that advertising, telephoning and deliveries to resident customers do not give rise to an in-state presence such as to subject the non-resident seller to regulation and tax. As recently as 1977 this Court has recognized the sharp distinction between mail order sellers having in-state retail outlets, solicitors or property and those like National Bellas Hess who do not. *National Geographic Society v. Board of Equalization*, 430 U.S. 559, 560 note 6, 97 S.Ct. 1386, 51 L.Ed.2d 631. The basic rule enunciated in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), approved in *National Geographic* is still controlling law which would require overturning for affirmance herein:

> "In order to uphold the power of Illinois to impose tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors or property within a state, and those who do no more than communicate with customers in the state by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been recognized by the state taxing authorities, is a valid one and we decline to obliterate it." (87 S.Ct. 1392).

We have previously called attention to this Court's holding that with respect to the McCarran-Ferguson Act it was "not the intention of Congress in the enactment of this legislation to clothe the state with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern

Underwriters Association Case." *State Board of Insurance v. Todd Shipyards,* 370 U.S. 451, 82 S.Ct. 1380, 1383, 8 L.Ed.2d 60 (1962).

Therefore the questions of violation of due process and the commerce clause are substantial in that this Court would have to reconsider and obliterate its repeated decisions above mentioned in order to sustain Appellee's motion.

Fourth (Failure to Apportion Tax):

Appellee Misperceives Appellant's Fourth Point on Failure to Apportion Premium Tax. (Replying to Point D, p. 7 of Appellee's Motion)

Appellee, on p. 7 under "D", wholly misperceives Appellant's point on non-apportionment of the tax. We do not contend that Appellee seeks to tax coverage on AFCIA's members not stationed in Wyoming. To the extent it does not do so there is of course what the District Court termed "apportionment of a sort". (A66). But this is not the sort of apportionment required. The full Wyoming tax is imposed on a policy issued to a Wyoming stationed member despite the fact that the entire effort to produce the business and write the policy is done outside Wyoming at Fort Leavenworth, and if Wyoming is permitted to impose an unapportioned single factor tax thereon so could Kansas. This question is therefore substantial.

Fifth (Impairment of Contract):

Appellant's Contended Impairment of Contract Is Worthy of Consideration by This Court. (Replying to Point E, p. 7 of Appellee's Motion)

Despite criticism of the court below that Appellant "has not presented us authority or cogent argument for

the proposition", Appellant in fact presented constitutional and U.S. Supreme Court authority in support of its contention of impairment of contract. If the Court below disagreed with such authority or deemed it to be insufficient such is no reason for this Court not to take cognizance of such a basic important point. Otherwise the Court below by regarding authority cited as insufficient to sustain a contention could by disregarding it make it impossible for a litigant to be heard before this Court. Appellant has been denied due process and asks to be heard.

Sixth (Personal Jurisdiction):

The Question of in Personam Jurisdiction Is Substantial. (Replying to Point A, pp. 3-4 of Appellee's Motion)

Appellee under its Point A has chosen to address itself to a question not emphasized in Appellant's Jurisdictional Statement but nevertheless preserved under Questions Presented and cites four of this Court's decisions as supporting *in personam* jurisdiction. Appellant did not argue this question of violation of due process therein because it obviously becomes moot if the state does not have constitutional power to regulate and tax a mail order insurer under the circumstances presented, the substantial presence required therefore being much greater than minimum contacts required for personal jurisdiction. Even so, the four cases cited by Appellee (pp. 3, 4 Appellee's Motion) fail to support its motion: (1) *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), held there was no *in personam* jurisdiction because defendant had no office and transacted no business within the state (78 S.Ct. at 1238). Neither does AFCIA in Wyoming. (2) *International Shoe Company v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945) held there

was *in personam* jurisdiction because defendant employed from 11 to 13 salesmen within the state who solicited orders and displayed samples, none of which was present in Wyoming. AFCIA has none in Wyoming. (3) *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 233 (1957), was an action by a California beneficiary on a life policy on a California insured mailed to insured in California who paid premiums by mail from California. *In personam* jursdiction by mail service was upheld. But the instant case was not brought by a party to a policy seeking its enforcement but by the state to enforce regulation and taxation. Required minimum contacts are dependent on relationships between litigating parties. (4) Finally, *Travelers Health Association v. Virginia*, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950) arose under the state blue sky laws, long since amended to exclude insurance policies and hence this decision loses persuasiveness. We agree that the question of *in personam* is worthy of consideration but did not emphasize it for the reason hereinabove mentioned. In this connection *Hanson v. Denckla*, supra, at p. 1239-1240 of 78 S.Ct. made it clear that the minimum contacts required for a non-resident to be amenable to *in personam* jurisdiction may not comprise "the unilateral activity of those who claim some relationship with a nonresident defendant", (such as activities of AFCIA's insureds in mailing their premium checks, obtaining data from firemen or police to substantiate their proofs of claim and possibly instituting suits in the state courts). All such services are paid out of taxes imposed on insureds and such unilateral activities "cannot satisfy the requirement of contact with the forum state" on the part of AFCIA. See also cases cited on page 21 of Jurisdictional Statement.

II

THE FEDERAL QUESTIONS RAISED BY APPELLANT ARE INDEED SUBSTANTIAL

A review of "Questions Presented" by the Jurisdictional Statement indicates basic, substantial and important federal questions. (1) The assertion by a state of the right to send its officials onto a federal enclave, inspect, examine and supervise activities there of senior military officers duly designated to carry on a non-profit insurance activity as a fringe benefit for military personnel throughout the world is as startling as it is novel, to say nothing of the state's regulation and taxation thereof and statutory requirement of Wyoming licensed agents to countersign policies. W.S. 26-3-130. (2) The only objection made to AFCIA's status as a federal means or instrument that it was not incorporated by an Act of Congress or a specific regulation raises a basic question: are lawful acts of the Department of Defense and its major components in appointing AFCIA as an officially recognized non-profit military association together with their bestowal of substantial monetary benefits including real estate for office use, and the efforts of senior military officers to manage AFCIA sufficient authorization? (3) Assertion by a state of right to tax and regulate a non-resident mail order activity having no office, property or agents within that state contravenes recent decisions of this Court prohibiting such as violative of due process and the commerce clause. (4) May a state impose an unapportioned single factor premium tax heretofore struck down in Wisconsin for failing to take into account the fact that almost if not all the effort to produce the insurance contracts was done outside Wyoming? (5) Does a state's request as distinguished from a formal order to cancel a contract before hearing constitute unconstitutional impairment of contract?

Indeed each federal question so presented is substantial and in the aggregate they merit plenary consideration by this Court in order to protect AFCIA and more than 88,000 members of AFCIA from being denied fundamental rights by unconstitutional state action. The constitutional provisions violated are cited under Questions Presented on pages I, II of Appellant's Jurisdictional Statement. This Court's constitutional interpretations of long-standing should not be obliterated by the state courts as was done below and any reconsideration of their current effect and meaning merits plenary treatment herein.

III

CONCLUSION

For the reasons given, Appellant submits that substantial federal questions and violations of federal constitutional provisions cited under Questions Presented in the Jurisdictional Statement upon which this cause depends merit plenary consideration by this Court.

Respectfully submitted,

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